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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-151087

DATE: September 15, 1981

MATTER OF: Historic Preservation Fund

DIGEST: Language in appropriations for the historic preservation grant program from the Historic Preservation Fund for the 1978 through 1981 fiscal years providing that funds appropriated for the program in each fiscal year were available for obligation for a two-year period takes precedence over conflicting language in the authorizing legislation that would allow the Department of the Interior to obligate funds appropriated for the program on a no-year basis.

This decision responds to a request from the Department of the Interior (Department) for our opinion as to the availability for obligation of certain funds appropriated in fiscal years 1978 through 1981 from the Historic Preservation Fund for the historic preservation grant program. For the reasons set forth below, it is our position that the funds appropriated for each of the fiscal years in question would not be available for obligation beyond the two-year period specified in each appropriation act.

As explained by the Department, the question arises due to "an apparent conflict between portions of the authorizing legislation for the historic preservation grant program and the annual appropriation legislation for the program." The provision in the authorizing legislation referred to by the Department is section 103(b) of the National Historic Preservation Act, Pub. L. No. 89-665 80 Stat. 915, 916, approved October 15, 1966, as most recently amended by subsection 203(a) of Pub. L. No. 96-515, 90 Stat. 2987, 2993, 16 U.S.C. § 470c (b). This provision reads as follows:

"The amounts appropriated and made available for grants to the States for the projects and programs under sections 470 and 470b and 470c to 470n of this title for each fiscal year shall be apportioned among the States by the Secretary in accordance with needs as disclosed in approved State-wide historic preservation plans.

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"The Secretary shall notify each State of its apportionment under this subsection within thirty days following the date of enactment of legislation appropriating funds under sections 470 to 470b and 470c to 470n of this title. Any amount of any apportionment that has not been paid or obligated by the Secretary during the fiscal year in which such notification is given and for two fiscal years thereafter, shall be reapportioned by the Secretary in accordance with this subsection." (Emphasis added.)

By authorizing the reapportionment of funds that were not paid or obligated by the Secretary of the Interior during the three-year period covered by the initial apportionment, this provision appears to contemplate the appropriation of monies for the historic preservation grant program on a no-year basis. Section 108 of the National Historic Preservation Act as amended, 16 U.S.C. § 470h, clearly states an intention to authorize the appropriation of these funds on a no-year basis.

Prior to the 1978 fiscal year, appropriations for the historical preservation grant program were in fact made on a "no-year" basis. For example, the following language from the appropriation for the program for the 1977 fiscal year is representative of the type of appropriation language that was used until 1978:

"For expenses necessary in carrying out a program for the preservation of additional historic properties throughout the Nation, as authorized by law (16 U.S.C. 461-467), and investigations, studies, and salvage of archeological values, \$22,000,000 to remain available until expended." (Emphasis added.) Pub. L. No. 94-373, 90 Stat. 1047, July 31, 1976.

Thus, so long as the funds for this program were appropriated on a "to remain available until expended" basis, there was no conflict with the language in 16 U.S.C. § 470c(b) authorizing the Secretary of the Interior to reapportion and obligate those funds without any fiscal year limitation.

However, beginning with 1978 fiscal year, the language appropriating funds for the program was changed to read as follows:

"For expenses necessary in carrying out the provisions of the Land and Water Conservation Fund Act of 1965, as amended (16 U.S.C. 4601-4-11),

\$45,000,000, to be derived from the Historic Preservation Fund, established by section 108 of that Act, to remain available for obligation until September 30, 1979." (Emphasis added.)
Pub. L. No. 95-74, approved July 26, 1977, 91 Stat. 289.

Similar language with respect to the period of availability of funds is contained in the subsequent appropriation acts for the 1979, 1980, and 1981 fiscal years. The change from "to remain available until expended" to "to remain available for obligation until September 30, 1979" in the 1978 fiscal year appropriation act was a Congressional amendment to the former language which the President's budget submission had proposed retaining. For fiscal year 1979 the Administration requested in its budget submission a return to the former language request which was not granted. The legislative histories of these two acts are silent on the reasons for changing the no-year appropriation to a two-year appropriation.

In our view, this appropriation provision clearly limits the period of availability for obligation of these funds to two years--the fiscal year for which the appropriation was made and the following fiscal year. The result of this change in time availability is that it nullifies in part the last sentence of section 103(b), 16 U.S.C. § 470c(b), quoted and underscored above. With appropriations available only for two years, States will have only that period and not three years in which to draw the grant funds available to them and if any States fail to draw their allotted funds, the funds will have lapsed before the reapportionment process established by the last sentence of section 103(b) can be implemented. Intended or not, we feel this is the inevitable result of changing the length of time that the funds are available. The Department of the Interior, however, disagrees.

In attempting to explain the obvious difference between the language in 16 U.S.C. § 470c(b) and the four most recent appropriation acts, the Department suggests the following interpretation:

"* * *In order to reconcile the Congressional actions, however, and particularly in light of the fact that the emphasized sentence of section 103(b) [16 U.S.C. 470c(b)] was reaffirmed by the Congress subsequent to the enactment of the several appropriation acts in question, we suggest that the language of the appropriation acts had the result of reducing the three-year period for obligation of HPF [Historic Preservation Fund] funds contained in section 103(b) to the two-year obligation period contained in

the appropriation language, but did not alter the Secretary's authority under section 103(b) to reapportion for further obligation funds not obligated by the States during the two-year period."

We must disagree with the Department's interpretation for several reasons.

First, the literal language of the appropriation provision deals with the period of availability for obligation of the funds. Neither the language nor legislative history of this provision gives even an indication that Congress simply desired to reduce the three year initial obligation period to two years but wished to retain the reapportionment process. Congress was silent on the reasons behind the change in appropriation act language and in the absence of explanatory legislative history, we must accept the plain meaning of the provision.

Second, we don't agree that Congress evidenced an intent to reaffirm the underlined sentence in 16 U.S.C. § 470c(b) as against the express provisions of the appropriation acts when it passed Pub. L. 96-615 on December 12, 1980. Although that law amended other portions of 16 U.S.C. § 470c(b), it did not amend, delete, or otherwise refer in any way to the particular sentence in question. Also, our analysis of the legislative history of this legislation did not reveal any indication that Congress was concerned about the Secretary's authority to reapportion and obligate funds for the historic preservation grant program on an indefinite basis when it enacted Pub. L. No. 96-515. It is not clear that Congress was even aware of the problem, although it is clear that it rejected the Administration's requests to appropriate "no-year" funds. We do not think that any clear conclusion concerning Congressional intent can be drawn in these circumstances from the mere re-enactment of this sentence.

Also, accepting for purposes of argument the Department's position that the amendments to 16 U.S.C. § 470c(b) contained in Pub. L. No. 96-515 were indicative of the intent of Congress to reaffirm the original meaning of that section, would leave an irreconcilable conflict between the three-year period of initial availability specified in the authorizing legislation and two-year period of initial availability that would be allowed under the Department's interpretation of the appropriation language. Thus, the Department cannot rely on the general rule of statutory construction favoring any reasonable interpretation that can reconcile two otherwise conflicting statutory provisions and thereby give effect to both.

Furthermore, even if Congress is viewed as having genuinely "reaffirmed" the sentence in question when it enacted Pub. L. No. 96-515, on December 12, 1980, we would not be inclined to agree with the Department's position

that the authorizing language should take precedence over the express appropriation act provision limiting the period of availability of the appropriated funds to two years. For one thing, reliance on the so-called "later-in-time" rule would be of little or no assistance in determining the intended meaning of the language in the 1978 and 1979 appropriation acts (the interpretation of which is of primary importance in determining the amount of moneys available for the 1980 and 1981 fiscal years) since the two-year period specified in the appropriation acts for 1978 and 1979 would have expired before the amendment allegedly reaffirming the intent of Congress to the contrary was enacted.

Third, in our view the appropriation act itself contains language which establishes that its provisions as to the time availability of funds take precedence over other statutory provisions. Each of the appropriation acts during the four year period in question contains the following general provision:

"No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein."

This provision is virtually standard in all appropriations acts and we have had numerous requests for decisions on conflicts between that provision and provisions in authorizing legislation with different availability periods. We have consistently held that the terms of the appropriations act govern. For example, in B-118638, November 4, 1974, we considered a question of the proper disposition of prior year funds that had not been obligated during the fiscal year in which the appropriation had been made. After quoting the standard appropriation provision concerning availability, we said the following:

"In applying this restrictive provision which is commonly included in similar if not identical form in a number of annual appropriation acts for Federal agencies, our Office has adhered to a literal interpretation of the language used therein and has not extended the availability of appropriations beyond the fiscal year for which appropriated without a clear indication in the appropriation act itself of such a congressional intent. * * * Consequently it is clear that these funds are fiscal year funds * * *."

Also, in 50 Comp. Gen. 857 (1971) we were asked to determine the period of availability of monies appropriated for the Federal Home Loan Bank Board. The authorizing language in that case authorized funds to be appropriated "without fiscal year limitation." The appropriation for the program, while authorizing expenditures in accordance with the authorizing legislation,

appropriated funds without specifying any period of availability beyond the particular fiscal year involved. However, the appropriation act did contain the standard provision that funds were only available for obligation beyond the current fiscal year if expressly so provided therein. In holding that the appropriation was only available for a single fiscal year, we held that the effect of the general proviso "is to require the act making the appropriation to expressly provide (rather than by incorporation by reference) for availability longer than one year if the enacting clause is to be overcome as to any specific appropriation contained therein."

Our Office reached the same conclusion for essentially the same reasons in 58 Comp. Gen. 321 (1979). In that case we held that a provision in the enabling legislation providing that funds appropriated for a particular program were to be available for the fiscal year in which the appropriation was made and the subsequent fiscal year was superseded by the same general provision referred to above.

Thus, in each of the foregoing cases we concluded, largely on the basis of the same general appropriation provision that is contained in the appropriations for the historic preservation grant program for the 1978 to 1981 fiscal years that funds appropriated in an annual appropriation act are only available in the fiscal year for which made unless the act itself expressly provides otherwise. We reached this conclusion regardless of contrary language in the substantive legislation that authorized appropriations to be made with a longer period of availability.

In our view, an even more compelling case exists here for the conclusion that the appropriation language must take precedence over the authorizing language since, unlike the cited cases where the specific appropriation for the program involved did not expressly provide for any definite period of availability, the appropriation for the historic preservation grant program for each year in question expressly stated that the funds were available for obligation for a two-year period. Thus, no serious argument can be made that the specific appropriation for the grant program is in any way unclear or ambiguous. When the express appropriation language is read in conjunction with the standard provision that funds appropriated in a particular fiscal year are only available for obligation beyond that year if expressly provided therein, the only possible conclusion, in our view, is that the funds appropriated for the historic preservation grant program for each of the four fiscal years involved are only available for obligation for a two-year period; i.e., the year for which each appropriation was made and the subsequent fiscal year.

In addition, we believe that the evolution of the substantive legislation involved is consistent with our position. When the legislation authorizing the historic preservation grant program was first enacted in 1966, the specific authorizing language set forth in 16

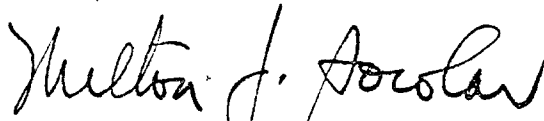
U.S.C. § 470h provided that appropriations for the program "shall remain available until expended." This was completely consistent with the reapportionment provisions in 16 U.S.C. § 470c as well as the manner in which funds were actually appropriated for the program until 1978 on an "available until expended" basis.

However, in 1976, Congress enacted Pub. L. No. 94-422, 90 Stat. 1313, 1320, September 28, 1976, which amended 16 U.S.C. § 470h by establishing the Historic Preservation Fund for the purpose of funding the historic preservation grant program. At that time, 16 U.S.C. § 470h was amended by replacing the "shall remain available until expended" language with the provision that appropriations for the program "may be made without fiscal year limitation." Although there was no specific explanation offered in the legislative history as to the basis for this change, we believe that the substitution of language that is merely discretionary for former mandatory language (although we recognize that even the mandatory language was not binding on Congress in the appropriation process) should be accorded some significance in determining Congressional intent. In this respect, it is clear that the type of discretionary language that was adopted when Pub. L. No. 94-422 was enacted providing that appropriations may be made without fiscal year limitation necessarily envisions the possibility that funds would not be appropriated in that manner as well, i.e., that they would be appropriated with fiscal year limitations. In fact, the first annual appropriation for the historic preservation grant program from the newly established Historic Preservation Fund after the discretionary language in 16 U.S.C. § 470h was adopted was the 1978 appropriation in which the language creating the two-year limit on the availability of funds for the program first appeared. This indicates that when Congress enacted the new appropriation language establishing a two-year limit on the availability of funds for the program in the 1978 appropriation and in every appropriation for the program since then, it clearly intended to do so.

In accordance with the foregoing, it is our conclusion that the funds appropriated from the Historic Preservation Fund for the historic preservation grant program for each of the fiscal years from 1978 through 1981 are only available for obligation for a two-year period including the fiscal year for which appropriated and the subsequent fiscal year. Therefore, funds appropriated for the program in the 1978 and 1979 fiscal years would have lapsed and been unavailable for obligation if not obligated before the end of the 1979 and 1980 fiscal years respectively. We understand that as a result of this ruling, the Historic Preservation Fund may be in an "antideficiency" act posture for the 1980 and 1981

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fiscal years. If this proves to be the case, the responsible officials within the Department of Interior will need to take promptly all of the actions required by 31 U.S.C. § 665(i) when an agency enters into obligations in excess of the available appropriations.

A handwritten signature in dark ink, appearing to read "Milton J. Aorolan". The signature is fluid and cursive, with the first name "Milton" being the most prominent.

Acting Comptroller General
of the United States